LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 23 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
GREATER BOSTON TELEVISION CORPORATION,
GREATER BOSTON TV CO., INC.,
CHARLES RIVER CIVIC TELEVISION, INC., and
BOSTON BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. DEMPSEY,
938 Bowen Building,
Washington, D. C. 20005,
Counsel for the Petitioner.

WILLIAM C. KOPLOVITZ,
J. RICHARD CARR,
JOHN J. DEMPSEY,
938 Bowen Building,
Washington, D. C. 20005,

FREDERICK BERNAYS WIENER
1750 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006,
Of Counsel.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Statutes and FCC Rules Involved	4
Statement	4
A. The Earlier Proceedings	4
B. The Current Comparative Proceeding Before the Commission	8
1. The Hearing Examiner's Initial Decision	8
2. The Commission's Decision	10
C. The Ruling of the Court Below	12
Reasons for Granting the Writ	16
Conclusion	28

APPENDICES SEPARATELY BOUND

Appendix A—Opinion Below	1a
Appendix B—Judgments Below	44a
1. Judgment of Affirmance	44a
2. Order Denying Rehearing	44a
Appendix C—Opinion of April 16, 1964	47a
Appendix D—Pertinent FCC Decisions	52a
1. FCC Decision adopted January 22, 1969, released January 23, 1969 (16 FCC 2d 1)	52a
2. Initial Decision of Hearing Examiner, adopted August 10, 1966, released August 15, 1966 (16 FCC 2d 29)	80a

Page

3. FCC Memorandum Opinion and Order adopted May 19, 1969, released May 20, 1969 (17 FCC 2d 856) 306a

4. FCC Decision adopted September 25, 1962, released September 26, 1962 (33 FCC 449) 326a

5. FCC Decision adopted March 13, 1963, released March 15, 1963 (34 FCC 537) 345a

Appendix E—FCC Policy Statement on Comparative Broadcast Hearings, July 28, 1965 (1 FCC 2d 393) 350a

Appendix F—FCC Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, January 14, 1970 (22 FCC 2d 424) 373a

Appendix G—Statutes Involved 383a

APPENDIX BOUND HEREIN

Appendix H—Opinion and Order Denying WHDH's Motion To Remand H1

AUTHORITIES CITED

CASES:

Brooks v. *Florida*, 389 U.S. 413 27
Burlington Truck Lines v. *United States*, 371 U.S. 156 ..... 21, 22, 23
Chicago Fed. of Labor v. *FRC*, 41 F.2d 422 9
Community Broadcasting Corporation v. *FCC*, 363 F.2d 717 15
Community First Corp. v. *FCC*, 403 F.2d 578 14
Consolidated Nine, Inc. v. *FCC*, 403 F.2d 585 14
Durham v. *United States*, #5298, this Term 22
Greater Boston Television Corp. v. *FCC*, 334 F.2d 552 ..... 2, 3, 7, 25
Greene v. *United States*, 376 U.S. 149 27
Massachusetts Bay Telecasters, Inc. v. *FCC*, 261 F.2d 55 ..... 2, 3, 5, 9

Page

Massachusetts Bay Telecasters, Inc. v. *FCC*, 295 F.2d 131, cert. denied 366 U.S. 918 ..... 2, 6, 24
Office of Communication of United Church of Christ v. *FCC*, 425 F.2d 543 14
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 21
Securities & Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 ..... 20, 22, 23
Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 ..... 20, 21, 22, 23
Thompson v. *Louisville*, 362 U.S. 199 27
United States v. *Morgan*, 313 U.S. 409 26
United States v. *Wunderlich*, 342 U.S. 98 19
Vitarelli v. *Seaton*, 359 U.S. 535 27
White v. *Texas*, 310 U.S. 530 27
Ziang Sung Wan v. *United States*, 266 U.S. 1 27

Judiciary and Judicial Procedure:

28 U.S.C. 1254(1) 3

Supreme Court Rules:

19(1)(b), 398 U.S. at 1030 27
35(5)(b) of 1925, 266 U.S. at 681 27

MISCELLANEOUS:

Policies of the Federal Communications Commission:

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 ..... 3, 9, 19

Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 ..... 3, 13, 17, 19, 23, 26

Jaffe, L.L.: "We Need the Pastore Bill", *The New Republic*, December 6, 1969 17

Jaffe, L.L.: WHDH: The FCC and Broadcast License Renewals, 82 Harv. L. Rev. 1693 17

Page

COMMISSION DECISIONS:

Community First Corp., 17 FCC 2d 479 14
Consolidated Nine, Inc., 17 FCC 2d 482 14
Hearst Radio, Inc. (WBAL), 16 FCC 141 .....9, 10, 13, 14, 17, 19
Lamar Life Broadcasting Co., 26 FCC 2d 100 14
RKO General, Inc. (KHJ-TV), 31 Fed. Reg. 8253 10
RKO General, Inc., FCC 69-1335 (34 Fed. Reg. 19852) 13
Wabash Valley Broadcasting Corp. (WTHI-TV), 35 FCC 677 .....9, 10, 13, 17, 19
WHDH, Inc., 18 RR 1101 ..... 2, 5
25 RR 80 7
22 FCC 767 ..... 2, 4
29 FCC 204 .....2, 5, 6, 24
29 FCC 986 2
33 FCC 449 .....3, 6, 7
34 FCC 537 3
16 FCC 2d 1 .....2, 19
16 FCC 2d 29 ..... 2, 8
17 FCC 2d 856 2

STATUTES AND RULES:

Communications Act of 1934, as amended:
47 U.S.C. 151 4
47 U.S.C. 307(d) 14
47 U.S.C. 307(e) 6
47 U.S.C. 310(b) 11
47 U.S.C. 402(j) 3

Rules of the Federal Communications Commission:
47 C.F.R. 1.539(a)(i) 6
47 C.F.R. 73.34(a)(8) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WHDH, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
GREATER BOSTON TELEVISION CORPORATION,
GREATER BOSTON TV CO., INC.,
CHARLES RIVER CIVIC TELEVISION, INC., and
BOSTON BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHDH, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 13, 1970.

OPINIONS BELOW

Judicial Opinions: The opinion of the court below, as twice amended after the filing of petitions for rehearing (Appendix A, *infra,* pp. 1a-43a), has not yet been reported. The opinion of the court below denying a remand (Appendix H, *infra*) has similarly not been reported.[1]

Earlier reported opinions in this case are *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55 (D.C. Cir., 1958); *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131 (D.C. Cir., 1961), certiorari denied, 366 U.S. 918 (No. 838, O.T. 1960); and *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552 (D.C. Cir., 1964) (Appendix C, *infra,* pp. 47a-51a).

FCC Decisions: The FCC decision that was the subject of review in the opinion of the court below is reported at 16 FCC 2d 1 (1969) and is set forth in Appendix D(1) *infra,* pp. 52a-79a; it dealt with the initial decision of the Hearing Examiner reported at 16 FCC 2d 29 (1966) that is contained in Appendix D(2) *infra,* pp. 80a-305a. The FCC decision on reconsideration, reported at 17 FCC 2d 856 (1969) is set forth in Appendix D(3) *infra,* pp. 306a-325a.

The FCC decision that was reviewed in *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55, is reported at 22 FCC 767 (1957).

Following the remand directed by the court in 261 F.2d 55, there were further proceedings before the Commission, reported at 18 R.R. 1101 (1959), 29 FCC 204 (1960) and 29 FCC 986 (1960). But the FCC Re-

---

[1] Appendices A-G to this petition are bound under a separate cover. Appendix H, which was not available until after the first seven appendices had been printed, is bound together with the petition.

port and Recommendation that was approved in *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131, certiorari denied, 366 U.S. 918, is not reported, and is available only in Pet. App. 120a-124a, No. 838, Oct. Term 1960.

The FCC decision reported at 33 FCC 449 (1962) was remanded for a limited purpose in *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552; it is one of the decisions still involved in the consolidated appeal now presented. It is accordingly set forth in Appendix D(4), *infra,* pp. 326a-344a, together with the FCC decision on rehearing, reported at 34 FCC 537 and contained in Appendix D(5), *infra,* pp. 345a-349a.

FCC Policy Statements. The FCC *Policy Statement on Comparative Broadcast Hearings,* reported at 1 FCC 2d 393 (1965) is set forth in Appendix E, *infra,* pp. 350a-372a.

The FCC *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,* reported at 22 FCC 2d 424 (1970) is set forth in Appendix F, *infra,* pp. 373a-382a.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra,* p. 44a) was entered on November 13, 1970. WHDH's petition for rehearing was denied on February 16, 1971 (Appendix B(2), *infra,* pp. 44a-46a). A motion to remand the case to the Commission based upon newly discovered evidence indicating that Commissioner Wadsworth had rejected the rationale of his two colleagues was denied on April 15, 1971 (Appendix H, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

1. Whether the decision of the Federal Communications Commission in this case set out any adequate justification for treating petitioner, an applicant for renewal of its television broadcasting license, on a wholly different basis from all other renewal applicants in the preceding 35 years and on the same wholly different basis from all subsequent renewal applicants.

2. Whether the reviewing court which affirmed the foregoing obviously discriminatory treatment of petitioner was justified in doing so on grounds that were not only not espoused by the Commission but were either specifically rejected or else expressly not decided by the Commission.

STATUTES AND FCC RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), and of the FCC Rules, are set forth in Appendix G, *infra,* pp. 383a-386a.

STATEMENT

The following recital, of necessity severely abbreviated because of the long duration of the controversy over Channel 5-TV in Boston, sets forth sufficient facts to indicate how the questions now presented arose.

A. The Earlier Proceedings

WHDH, Inc., a Boston radio licensee that was acquired by the Herald-Traveler Corporation in 1946, applied for television facilities in 1947. After extensive proceedings before the FCC, hereinafter simply the Commission, WHDH was chosen over three competitors and was granted a construction permit in 1957 (22 FCC 767); it began TV broadcasting the same year. On appeal, the District of Columbia Circuit

affirmed the Commission, saying that "We thus rule definitively so that repose may enfold this litigation if the steps next to be prescribed shall disclose no vitiating developments." *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55, 65 (D.C. Cir., 1958). The court on the basis of extra record information remanded the case to the Commission for evidentiary hearing and its determination whether Robert Choate of WHDH had, during the pendency of the proceedings before it, improperly approached any of the Commissioners.

The matter was referred to a special Hearing Examiner, the Hon. Horace Stern, a former Chief Justice of Pennsylvania, who found that Choate had had two luncheons (over a year apart) with then Chairman McConnaughey, both in public hotel dining rooms, as the guest of a mutual friend and with a fourth person present at the second one, and that there was no discussion of the merits of the television case on either occasion. He also found as a fact (18 R.R. 1101, 1108 (1959)) that "there is not a shred of credible evidence that there was any attempt there on the part of Choate to present the merits of the Herald application, the qualifications of the Herald organization, or anything in derogation of the other applicants,—in short, nothing that either in law or codes of professional or judicial ethics could justifiably be regarded as impairing the validity or propriety of the award which was subsequently made by the Commission."

The Commission, however, while finding "no cause to disturb the Examiner's basic findings as to the honesty of the witnesses," none the less did "not believe that all of the witnesses disclosed fully their actions and motives" (29 FCC 204, 207 (1960)), and accordingly proceeded to hold, dehors the record, that Choate was motivated by an attempt to influence the

outcome of the case. It therefore purported to vacate and set aside its earlier 1957 order that had granted a construction permit to WHDH, and directed a comparative reevaluation of the applicants concerned (29 FCC 204).

This order was stayed on the court's own motion and was never directly reviewed. Instead, the Commission issued an unreported Report and Recommendation (available at Pet. App. 120a-124a, No. 838, Oct. Term 1960) to the same effect, which the court then approved—but without having record, briefs or a hearing thereon. *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131 (D.C. Cir. 1961), certiorari denied, 366 U.S. 918 (No. 838, Oct. Term 1960).

Following briefs and oral argument, the Commission, on September 26, 1962, reinstated the construction permit to WHDH, but because of the fact that WHDH had by then been actually operating for more than the maximum statutory three year license period and also because of Mr. Choate's actions, made a grant to WHDH of an operating license for 4 months (33 FCC 449, 454; Appendix D(4), *infra,* p. 331a) rather than for the six months remaining in the regular period, *i.e.,* until the prescribed license expiration date for the New England region. 47 CFR 73.34(a)(8), Appendix G, *infra,* p. 385a.

WHDH filed for renewal on October 25, 1962, 90 days prior to the expiration of its four-month license as provided by § 1.539(a) (then § 1.328(a)) of the Commission's rules (Appendix G, *infra,* p. 385a). This rule, coupled with 47 U.S.C. § 307(e)[2] prohibiting Com-

[2] 47 U.S.C. 307(e) reads: "No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license."

mission grant of such application earlier than 30 days prior to its termination date, provided a minimum 60 day period during which any competing applicant could file with assurance of receiving comparative consideration. "Commission rules to the contrary, if any, notwithstanding" the Commission issued a general invitation for applicants filing before March 26, 1963 to participate in a comparative hearing, thereby giving them an unprecedented 150 days after the filing of the WHDH renewal application to do so. 25 R.R. 80 (1962). Three applicants, Boston Broadcasters, Inc. (BBI), Charles River Civic Television, Inc., and Greater Boston TV Co., Inc., took advantage of this extended invitation and filed competing applications.

WHDH and one of the unsuccessful applicants appealed the decision reported at 33 FCC 449 (1962), the former challenging only the conclusion of impropriety on Choate's part.[3] While those appeals were pending and while the renewal comparative hearing was in progress before the Commission, Choate died, whereupon the court in April 1964 remanded the case to determine what effect that circumstance would have on the awards, authorizing the Commission to combine the remand proceedings with the pending comparative renewal hearing which had commenced in November 1963. *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552 (D.C. Cir., 1964) (Appendix C, *infra,* p. 47a). The Commission ordered a consolidation for limited evidentiary purposes only (Appendix D(1), *infra,* ¶ 2, pp. 53a-54a).

---

[3] The statement in the opinion below (Appendix A, *infra,* p. 7a), to the effect that WHDH also protested the short term of the license, is in error; the briefs filed in those cases (C.A. D.C., Nos. 17785 and 17788) show that WHDH addressed itself only to the Commission's conclusion that there had been an improper attempt to influence its proceedings.

B. The Current Comparative Proceeding Before the Commission

1. *The Hearing Examiner's Initial Decision*

Extensive hearings were held before the Examiner; between November 21, 1963, and July 16, 1965, there were 169 days of hearing sessions. On August 10, 1966, Hearing Examiner Herbert Sharfman issued an elaborate Initial Decision, in favor of granting the renewal to WHDH (16 FCC 2d 29; *infra,* Appendix D (2), pp. 80a-305a).

The Hearing Examiner held that "because of Mr. Choate's death his *ex parte* contacts are no longer a factor in the comparative consideration" (App. D(2), *infra,* ¶ 739, at 278a), observing that "in the circumstances it would be almost sadistic to perpetuate a curse against a corporation for something which had not helped but had hurt it merely—for it comes down to this—to demonstrate the inviolability of the Commission's procedures. Such Biblical fury is not properly a part of the administrative process." (*id.,* ¶ 738, at 278a).

The Hearing Examiner then went on to hold that WHDH had successfully met all of the issues designated by the Commission and by its Review Board, and that BBI had failed to do so. See his Summation, App. D(2), ¶¶ 787-801 at 297a-302a, which summarizes masses of detailed factual data.

The Hearing Examiner proceeded throughout on the footing that a comparative proceeding between an existing licensee seeking to have his license renewed and applicants for initial authorization differed substantially from a comparative proceeding between new applicants for original authority to broadcast. In the all new applicant comparative proceeding, there

was of course no prior performance, so that the question of who would best foster the public interest in the future necessarily rested on competing promises, and hence was essentially speculative. Where however a renewal was in question, there was direct evidence of past performance, and speculation was unnecessary. Specifically as applied to the newspaper ownership of television facilities, in a renewal proceeding it can be objectively determined whether such joint ownership in fact adversely affected performance, whereas in a comparative proceeding between new applicants the significance and potential of such joint ownership, although not controlling, might well loom larger if more speculatively. *Massachusetts Bay Telecasters, supra,* 261 F.2d at 64.

In thus approaching the case on the basis of an essential difference between comparative proceedings involving only applicants for initial authorization and those involving an applicant for renewal of license, the Hearing Examiner was following a Commission policy first promulgated in 1951, following a court decision twenty one years earlier. *Hearst Radio, Inc. (WBAL),* 16 FCC 141 (1951); *Wabash Valley Broadcasting Corporation (WTHI-TV),* 35 FCC 677 (1963); *Chicago Federation of Labor* v. *FRC,* 41 F.2d 422 (D.C. Cir., 1930).

After the close of the evidentiary record before the Hearing Examiner, on July 16, 1965, the Commission had announced a modified codification of its criteria for comparative hearings involving only applicants for initial authorization. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965); *infra,* Appendix E, pp. 350a-372a. That Policy Statement commenced with a declaration that "One of the Commission's primary responsibilities is to choose

among qualified new applicants for the same broadcast facilities," followed by the immediate caveat that "This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." That Policy Statement was issued on July 28, 1965, twelve days after the evidentiary record herein was closed; the caveat was reaffirmed on June 8, 1966, when the Commission said "That remains our position" (*RKO General,* (KHJ-TV), 31 Fed. Reg. 8253); and the Hearing Examiner in this case issued his Initial Decision two months thereafter, on August 10, 1966.

Accordingly, the Hearing Examiner concluded his Initial Decision—which extends to over 235 pages in the FCC Reports—with an order that reaffirmed the Commission's decision of September 26, 1962 (*supra,* p. 6) to reinstate the construction permit to WHDH, and that granted WHDH's application for a renewal of its license for the regular period, rejecting the three competing applications (App. D(2), ¶ 802, pp. 302a-303a).

2. *The Commission's Decision*

A minority of the Commission—three Commissioners abstained or were absent, and one of the remaining four dissented—while accepting substantially all of the Examiner's findings of fact (App. D(1), ¶ 5, p. 55a), and, conceding (*id.* ¶ 18, at p. 60a) that his decision to grant renewal to WHDH was correct under the policy promulgated in the *Hearst* and *Wabash* decisions, (*supra,* p. 9), stated that those decisions would no longer be followed in comparative proceedings involving new and renewal applicants (*id.,* ¶¶ 18, 19, pp. 60a-61a), held that renewal applicants should be treated like new applicants, therefore held that for the future

the 1965 Policy Statement contrary to its terms should apply to new applicant-renewal situations as well as to all new applicant cases, and under that Policy Statement refused to give any comparative consideration to WHDH's admittedly "favorable" past broadcast record (*id.*, ¶ 23, at p. 62a). It thereupon found that WHDH should lose out to BBI because it was newspaper owned and had a lesser degree of integration of ownership and management, and on that basis ordered (App. D(1), ¶ 55, at pp. 70a-71a):

> "That the application of Boston Broadcasters, Inc. for a construction permit for a new television broadcast station to operate on channel 5 in Boston, Mass., *Is granted;* that the application of WHDH, Inc. for renewal of license of station WHDH-TV *Is denied;* and that the applications of Charles River Civic Television, Inc. and Greater Boston TV Co., Inc. for construction permits for a new television broadcast station to operate on channel 5 in Boston, Mass., *Are denied.*"

The Commission explicitly refrained from passing on whether Choate's death abated the demerit charged against WHDH because of his two meetings with Chairman McConnaughey (*id.*, ¶ 14, p. 58a).

WHDH petitioned for rehearing, which was granted in minor part only, *i.e.*, in respect to one aspect of certain alleged unauthorized transfers of control of the Herald-Traveler Corporation, in asserted violation of 47 U.S.C. § 310(b), see Appendix D(3) *infra*, ¶¶ 13-18, at pp. 311a-314a; in all other respects it was denied and the earlier decision was reaffirmed.

The Commission then included in its decision on rehearing the following paragraph reciting factors which had induced BBI and two others to file competing applications; in view of the issues now presented, that

passage requires quotation in full (Appendix D(3) *infra*, ¶ 40, at pp. 322a-323a):

> "40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the '* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * *.' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license."

C. The Ruling of the Court Below

Two significant steps occurred, one during the pendency of WHDH's petition to the Commission for rehearing, the other during the pendency of WHDH's appeal to the court below.

1. The Pastore Bill, named for the Chairman of the Communications Subcommittee of the Senate Commerce Committee (S. 2004, 91st Congress, 1st session, April 29, 1968), and sponsored by 28 Senators (and by

over 100 Representatives, who introduced many similar or companion measures), proposed to require a two-hearing procedure, wherein the issue of renewal would be determined prior to and to the exclusion of the evaluation of new applications.

2. Thereafter, on January 15, 1970, the Commission issued a new Policy Statement (22 FCC 2d 424; Appendix F, *infra,* pp. 373a-382a), which provided that the renewal issue would be determined first, in a proceeding in which new applicants would be able to appear only to the extent of showing the licensee's shortcomings, and in which full comparative hearings would be held only on a showing that the licensee had failed to render a "substantial" service.

In its 1970 Policy Statement the Commission announced that, in order to insure predictability and stability and yet to retain an incentive for broadcasters to furnish good service and so to avoid further comparative hearings, a licensee with a record of solid and substantial service to the community and without substantial deficiencies, would be entitled to renewal even in the face of promises of superior performance by new applicants. It said: "This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc., (WBAL),* 15 FCC 1149 (1951), . . . The WBAL policy was followed in *In re Wabash Valley Broadcasting Corp.,* 35 FCC 677 (1963) and cited with approval in recent actions (see, e.g., *In re Application of RKO General, Inc.,* FCC 69-1335, ¶ 8."[4] (Appendix F, *infra,* p. 374a).

[4] FCC 69-1335, adopted December 3, released December 11, 1969, is reported in 34 Fed. Reg. 19852-53. It recited, "Since this is a renewal-new applicant proceeding, RKO's past broadcast record during the previous license term, favorable and unfavorable, will be relevant, *Hearst Radio, Inc.,* 15 FCC 1149, 6 RR 994 (1951)."

In its 1970 Policy Statement, the Commission made clear that the "*WBAL* policy" would be applicable except in "those unusual cases, generally involving court remands, in which a renewal applicant is for *sui generis* reasons to be treated as a new applicant." Examples of such *sui generis* cases are *Lamar Life Broadcasting Co.*, licensee of Channel 3, Jackson, Mississippi; *Consolidated Nine, Inc.*, licensee of Channel 9, Orlando, Florida, and *Community First Corp.*, licensee of Channel 12, Jacksonville, Florida. The court below vacated these licenses. *Office of Communications of United Church of Christ* v. *FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Consolidated Nine, Inc.* v. *FCC*, 403 F.2d 585 (D.C. Cir. 1968); *Community First Corporation* v. *FCC*, 403 F.2d 578 (D.C. Cir. 1968). The Commission following these decisions provided for interim operation by an entity other than the previous licensee pending hearing and determination of comparative proceedings involving the former licensee and new applicants for each of the respective facilities. 26 FCC 2d 100 (1970); FCC 69-287, see 17 FCC 2d 482, n. 2 (1969); and FCC 69-286, see 17 FCC 2d 479, n. 3 (1969). In so doing, the Commission found Section 307(d) of the Act inapplicable.[5]

But, when *Consolidated Nine* and *Community First* were urged on the Commission in this case as authority for treating WHDH as a new applicant, terminating its operation on Channel 5 and authorizing "interim" operation thereon by a group composed of

---

[5] The provision of 47 U.S.C. 307(d) (Appendix G, *infra*, p. 383a) that a licensee who files an application for renewal shall have his license continued in effect pending hearing and final determination on the renewal application, does not apply except in such a case.

all the applicants therefor, they were held inapposite on the stated ground that "Unlike the television station operators in those cases, WHDH here received a valid grant of a license even though such license was issued for a period of 4 months only, and that grant has not been vacated" (Appendix D(3), *infra,* ¶ 38, at pp. 321a-322a). And in not less than three other places in its May 19, 1969 ruling on rehearing in this case, and at least once at an earlier date (1964), the Commission reiterated that the application of WHDH was one for renewal of station license, that Section 307(d) applied to it, and that the Commission had dealt consistently with it on that footing (Appendix D(3), *infra,* ¶ 21, pp. 315a-316a; ¶ 37, p. 321a; ¶ 39, p. 322a).[6]

Nevertheless, the court below affirmed. It first generalized concerning "the Rule of Law" and "Administrative Law"—both capitalized, see Part II(A) of the opinion, Appendix A, *infra,* at pp. 15a-22a.

The court below then proceeded to justify the Commission's application of new not renewal applicant criteria to WHDH as appropriately "handcrafted" because "WHDH was neither a new applicant nor a renewal applicant" (Appendix A, *infra,* at p. 35a), and did so on the footing that the earlier proceedings dealing with Mr. Choate's actions warranted the Com-

---

[6] The District of Columbia Circuit had previously held in the case of a comparative hearing involving renewal of a four month license, *Community Broadcasting Corp.* v. *FCC,* 363 F.2d 717, 720 (1966): "... there is, of course, nothing in the statute which prescribes that an initial grant shall be for one, twelve, or thirty-six months. For the period of the grant, whatever it may be, the licensee who has been found qualified is like any other, except in the knowledge that renewal must be accomplished at an earlier date."

mission in doing what it explicitly said it did not do, *i.e.* use "the tainted overtures of WHDH as a reason for fresh consideration of all applicants" (Appendix A, *infra,* p. 31a), and on that basis (*id.* at p. 34a) "to hold WHDH to a higher comparative standard than that required of renewal applicants generally." The court below so held despite the Commission's express holding that it was "unnecessary" to disturb the Examiner's conclusion that "because of Mr. Choate's death his *ex parte* contacts are no longer a factor in the comparative evaluation" (Appendix D(1), *infra,* ¶ 14, p. 58a), followed by its express refusal to do so in denying rehearing to BBI and Charles River (Appendix D(3), *infra,* ¶ 23, p. 316a).

Accordingly, the court below affirmed, and in due course denied rehearing (Appendix B(2), *infra,* pp. 44a-46a).

REASONS FOR GRANTING THE WRIT

This is a case—in the interest of maintaining poise, we deem it preferable to quote the conclusion of an outsider who is alike objective, learned, and distinguished—this is a case in which "the Commission, overturning its practice of decades—a practice upon which the economics of the broadcasting industry has been built—decided that a broadcaster's license would be up for grabs every three years! * * * In WHDH there was no finding [by the Commission] that the licensee had misbehaved or that its programs were deficient; simply a determination that a competing applicant was preferable because WHDH was owned by a newspaper and it was not. The objective of diversifying the media is absolutely sound, and in an initial contest for a license there is a valid basis for preferring an independent to a newspaper-owned applicant. * * * But

to license a newspaper-owned broadcaster and then after the investment is made to forfeit it to a newcomer is inexcusable. It is inequitable and functionally unsound."[7]

The Pastore bill and its counterparts reflected legislative agreement with the foregoing views, and on January 14, 1970, in order to allay further criticism, the Commission adopted a *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants* (22 FCC 2d 424; Appendix F, *infra,* pp. 373a-382a). This new policy reinstated the *Hearst* and *Wabash* doctrine that the rump Commission in the WHDH case had refused to follow, so that thereafter criteria appropriate for new applicant comparisons would not be applied in renewal proceedings.

But—the 1970 Policy Statement did not give WHDH the benefit of this return to established principles. Consequently WHDH stands as the only licensee with a valid existing license that has ever been given comparative consideration under the criteria reserved for initial applicants in the Commission's entire history.

On top of that, the Commission's inexcusable and inequitable action in this case—the characterizations are Professor Jaffe's—was compounded by the decision below, which not only sustained the Commission's treatment of WHDH under standards different from those applied to any renewal applicants before or since,

---

[7] L. L. Jaffe, *We Need The Pastore Bill,* The New Republic, December 6, 1969, p. 14 at p. 15. The writer, Byrne Professor of Administrative Law at Harvard, and author of a standard text, *Judicial Control of Administrative Actions* (1965) had earlier expressed concern over the Commission's decision. WHDH: *The FCC and Broadcasting License Renewals,* 82 Harv. L. Rev. 1693 (June, 1969).

but, using a technique of review that this Court has repeatedly condemned, rested such justification on one ground that the Commission not only did not itself espouse but indeed specifically refrained from discussing, and then on another that the Commission had repeatedly rejected in this very proceeding.

First. In this petition we do not ask that the Court review the wisdom or otherwise of Commission policies relative to joint versus separate ownership of newspaper and television facilities; those can be left to legislative oversight. What we challenge here is simply the power of the Commission to change its criteria for renewal in midstream, so that one rule for renewal applies to this petitioner while a wholly different rule was applicable to all others before then and was thereafter reapplied to all others. The court below avoided the challenge, saying, "Fortunately, the present posture of this case permits us to refer to these problems as matters that are not involved in our decision." (Appendix A, *infra,* p. 24a). The court below then purported to find in ¶ 40 of the Commission's rehearing decision (quoted *supra,* p. 12) a basis for saying that the Commission had not treated WHDH as a renewal applicant, and this despite the Commission's failure to say anything remotely resembling that in ¶ 40 and despite its repeated categorical contrary holdings.

Such action cannot be sugar-coated by generalized homilies about "the Rule of Law" or "Administrative Law," here capitalized by way of beatification if not of canonization (Appendix A, *infra,* pp. 15a, 20a). Such action, making a particular set of criteria for judgment applicable to only a single litigant, has passed well beyond the boundary of allowable discre-

tion into the area of tyranny. It is well, therefore, to recall what some members of this Court said two decades ago (*United States* v. *Wunderlich,* 342 U.S. 98, 101):

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

No amount of verbiage, no collection of abstract platitudes, no stringing together of pious homilies, can conceal the fact, which indeed appears plainly and without dispute from the opinion below, that (1) the Commission since 1951 had consistently ruled that renewal proceedings were not to be turned into *ab initio* comparative proceedings (*Hearst Radio, Inc. (WBAL),* 16 FCC 141 (1951); *Wabash Valley Broadcasting Corp. (WTHI-TV),* 35 FCC 677 (1963)); that (2) the Commission reaffirmed this precise position when it specifically declared inapplicable to renewal proceedings its 1965 Policy Statement on Comparative Broadcast Hearings (1 FCC 2d 393; Appendix E, *infra,* p. 350a); that (3) when the Hearing Examiner in this case applied the established *"WBAL* policy" to WHDH he was reversed by three members of the Commission (16 FCC 2d 1; Appendix D(1), *infra*); and that (4) the Commission in 1969, and in 1970 again reaffirmed (by a six-to-one vote) the *WBAL* policy for all renewal applicants—all except WHDH (22 FCC 2d 424; Appendix F, *infra,* at pp. 373a-382a).

Or, more briefly stated, WHDH has been singled out as the only renewal applicant in the thirty-five year history of the Commission to be denied renewal rights. And, most shocking of all, such crass administrative discrimination has now received the imprimatur of judicial approval.

It may well be, as the court below appeared to rationalize, that "some things are bound to happen for the 'first time' " (Appendix A, *infra,* p. 35a). But it is surely a repudiation of the very essence of justice according to law when, as here, something happens for the only time.

Second. This Court has repeatedly ruled that agency action must stand or fall solely on the grounds invoked by the agency, and that a reviewing court is powerless to affirm such action by substituting another basis.

The first formulation of this principle appears in the first *Chenery* case (*SEC* v. *Chenery Corp.,* 318 U.S. 80, 87):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

A more detailed restatement of the same doctrine was set forth in the second *Chenery* case (*SEC* v. *Chenery Corp.,* 332 U.S. 194, 196), as follows:

> "* * * a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

Then, more recently, the Court was required to reaffirm the foregoing rule (*Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-169):

> "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: [Repeating the quotation from second *Chenery* set out immediately above.] For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U.S. at 196."

But this thrice forbidden course was precisely the one taken by the court below, which rested its approval of the Commission's grossly discriminatory action on two different grounds, neither of which had been espoused by the Commission: The Commission had specifically refused to determine the first ground relied on by the court, while the second ground on which the court proceeded had been considered by the Commission and had been expressly and repeatedly rejected by it.

The court below first undertook to sustain the Commission's palpable discrimination against WHDH by exhuming the details of Mr. Choate's conduct, which it characterized as "the tainted overtures of WHDH" (Appendix A, *infra,* pp. 26a-33a) and this although the Commission itself had never relied on that factor either in its original January 1969 decision or in its May 1969 determination on rehearing.

The Hearing Examiner found specifically that all traces of Choate's activities had evaporated, and that to resurrect them now "would be almost sadistic" would "perpetuate a curse," that it would be simply "Biblical fury," and that it "would serve no prophylactic but only an emptily minatory purpose" (Appendix D(2), *infra,* ¶ 738, at 278a).

The Commission in its original decision expressly declined decision on this issue (Appendix D(1), *infra,* ¶ 14, at p. 58a), and in its ¶ 23 on rehearing (Appendix D(3), *infra,* at p. 316a), again refused to consider it.

Accordingly, in justifying the Commission's discriminatory treatment of WHDH on the basis of Choate's conduct, the court below flouted the principle laid down here in both *Chenery* cases and in the more recent *Burlington Truck Lines* decision.

Reliance on the acts of a dead man is the more unjustified in the present case in view of a recent ruling here that followed the decision below.

In *Durham* v. *United States,* No. 5298, this Term, decided March 8, 1971, this Court held that, where a criminal defendant whose conviction had been affirmed petitioned for certiorari and died while such petition was pending, the proper course was to vacate the judgment of affirmance and to dismiss the indictment. But in the present case Mr. Choate's death, far from persuading the court below to dismiss the charges against him, induced that tribunal to reinstate those charges and to give them controlling effect—even though the Commission made a particular point of not even passing on them as necessary to the result it reached.

The second violation of the *Chenery-Burlington* doctrine on the part of the court below involved its holding that WHDH was not a renewal applicant (Appendix A, *infra,* at p. 35a).

The Commission, however, had not only repeatedly refused so to rule, but on the contrary had repeatedly ruled that WHDH was a renewal applicant and was entitled to be treated as one. The exception in its 1970 Policy Statement for certain "renewal" applicants whose cases were to be treated as though they were new applicants dealt only with stations whose licenses had actually been cancelled. See discussion and full references at pp. 14-15, *supra,* all of which demonstrate conclusively not only that the *sui generis* exception in the Commission's 1970 Policy Statement (22 FCC 2d at 430; *infra,* Appendix F, at p. 379a) did not apply to a station in WHDH's situation, but also that the Commission had repeatedly and specifically so held in this very case.

Yet the rationale adopted by the court below was that WHDH was not a renewal applicant (Appendix A, *infra,* at pp. 32a-35a). This was a rationale not supported by ¶ 40 of the Commission's decision on rehearing, and wholly contrary to the Commission's rationale in its main and rehearing decisions of January and May 1969. Hence it was not a permissible ground for affirmance under *Chenery* and *Burlington Truck Lines.*

Third. The crying unfairness of what was done in this case is highlighted by three additional factors that require brief mention.

1. The court below dwelled at some length on the conclusions arrived at by the Commission on July 14, 1960, to the effect that Choate had "demonstrated an attempted pattern of influence" (29 FCC 204, 211-212), and indeed quoted extensively from them (Appendix A, *infra,* pp. 27a-29a).

But the quoted conclusions were never the subject of judicial review! What was approved in the decision in 295 F.2d 131 was not the July 1960 Commission action now quoted by the court below, but rather the unreported Report and Recommendations dated November 1960 (Pet. App. 120a-124a, No. 838, Oct. T. 1960), and that approval was entered November 1960 (Pet. App. 120a-124a, No. 838, Oct. T. 1960) without granting WHDH a hearing of any kind.[8] When WHDH thereupon sought review here because of precisely such refusal to hear before deciding, the Commission opposed review on the footing that the order assailed by WHDH was "interlocutory" (Br. Op. 9, No. 838, Oct. T. 1960); and certiorari was denied, 366 U.S. 918.

Consequently the court below in this case has not only rested its approval of the Commission's discriminatory action on a ground expressly rejected by the Commission, but the ground that it relied upon—the Commission's July and November 1960 conclusions—have never yet been examined in the orderly processes of judicial review.

---

[8] The Solicitor General in his brief for the Commission opposing certiorari in No. 838, Oct. Term 1960, admitted that (p. 13) "the court itself has not passed upon the evidence or the findings which led the Commission to conclude that a new hearing should be held." In footnote 5, he added, "the Commission record on remand was not before the court when it adopted the order here in question."

2. In April 1964, in the decision that is reported at 334 F.2d 552 (Appendix C, *infra,* p. 47a), the court below remanded the case to the Commission to determine the effect of Mr. Choate's death, both in respect of the earlier demerit arising from his conduct as well as in respect of the favorable factors stemming from his knowledgeable broadcasting activities as chief executive of WHDH-AM, saying that (334 F.2d at 554; *infra,* p. 50a) "Obviously the resultant net assay is initially for the Commission."

But, as has been shown, the Commission never made the assay; the Commission held only that since Choate's death did not, for the reasons given by the Examiner, cancel the favorable factors (Appendix D(3), ¶ 21, at pp. 315a-316a), no modification of its September 26, 1962 decision was necessary. It explicitly refused to make any determination of the effect of Choate's death on the unfavorable factor.

Consequently, the case in its present posture stands as one where the reviewing court, faced with a studied refusal on the part of the agency to make such a determination, despite the court's remand for that specific purpose, nearly seven years later (during all of which time WHDH has been on the air), elected to substitute itself for the Commission and make its own determination in the first instance.[9]

---

[9] Notwithstanding the *sua sponte* consolidation of the three appeals from the Commission's 1969 decision with the two appeals that had been remanded in 1964 pursuant to the decision in 334 F. 2d. 552, the court below did not have before it the record on remand dealing with the effect of Choate's death on the "*ex parte*" demerit, refused to order the Commission to produce it, and denied requests to have the issues briefed.

It would surely be difficult as an original proposition to find a more egregious flouting of the long established guideline that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice and [that] the appropriate independence of each should be respected by the other." *United States* v. *Morgan,* 313 U.S. 409, 422.

3. The Commission in its ¶ 40 on rehearing noted the circumstance that WHDH's license was granted only for 4 months rather than for the regular period, and this theme is elaborated in the opinion below (Appendix A, *infra,* pp. 30a, 32a).

But the fact is that if WHDH had been granted a license for "the regular period" on September 26, 1962, it would have received, not a 3-year license, but only a 6-month license rather than the one for 4 months that it received. See p. 6, *supra.*

Yet this 2-month curtailment has been blown up to the point where it has now been held to justify and to legalize one of the most utterly discriminatory agency actions in the books, one which arbitrarily destroys a TV station that for nearly 14 years has given its community satisfactory service in the public interest.

Fourth. The Commission will doubtless oppose this petition on two grounds, first that this is a unique case, second that it can never recur, so that on either basis the matter lacks the necessary public interest to warrant this Court's attention.

We agree fully that this case can never recur; the Commission's Policy Statement of January 1970 (22 FCC 2d 424; Appendix F, *infra,* p. 373a) insures

against similar arbitrariness in the future, which of course explains why the Pastore bill was not reintroduced in the 92d Congress: There was no longer any need to do so after issuance of the cited 1970 Policy Statement.

We agree also that this is indeed a unique case. Indeed, it is the gravamen of our complaint that WHDH has been treated differently from every other renewal applicant in the thirty-five year history of the Commission. Such arbitrary discrimination is itself a ground for review, for certainly in the past this Court has regularly reviewed gross and indeed shocking injustices that happily might never recur. E.g., *Ziang Sung Wan* v. *United States,* 266 U.S. 1; *White* v. *Texas,* 310 U.S. 530; *Vitarelli* v. *Seaton,* 359 U.S. 535; *Thompson* v. *Louisville,* 362 U.S. 199; *Greene* v. *United States,* 376 U.S. 149; *Brooks* v. *Florida,* 389 U.S. 413.

While the foregoing listing includes criminal cases, the principle of those decisions is one of universal application. For it is precisely the circumstance of unique but overwhelming injustice that underlies the "so far departed from the accepted and usual course of judicial proceedings" clause, now in Rule 19(1)(b) (398 U.S. at 1030), that has been in this Court's Rules unchanged for over 45 years; see Rule 35(5)(b) of 1925, 266 U.S. at 681. And here the departure is underscored by the circumstance that what was done below in this case flew in the face of settled rulings of this Court forbidding reviewing tribunals from affirming agency action on grounds not espoused by the agency itself.

CONCLUSION

This case cannot fairly be characterized other than as a blot on, and a grievous injury to, the administrative process. The present petition for certiorari should therefore be granted.

Respectfully submitted.

WILLIAM J. DEMPSEY,
938 Bowen Building,
Washington, D. C. 20005,
Counsel for the Petitioner.

WILLIAM C. KOPLOVITZ,
J. RICHARD CARR,
JOHN J. DEMPSEY,
938 Bowen Building,
Washington, D. C. 20005,

FREDERICK BERNAYS WIENER
1750 Pennsylvania Avenue, N. W..
Washington, D. C. 20006,

Of Counsel.

APRIL 1971.

APPENDIX

APPENDIX H

OPINION AND ORDER DENYING WHDH'S MOTION TO REMAND

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 17,785

GREATER BOSTON TELEVISION CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WHDH, INC., a Massachusetts Corp., *Intervenor*

No. 17,788

WHDH, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
GREATER BOSTON TELEVISION CORPORATION, a Massachusetts Corporation, *Intervenor*

No. 23,154

CHARLES RIVER CIVIC TELEVISION, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WHDH, INC., *Intervenor,*
BOSTON BROADCASTERS INC., *Intervenor*

H2

No. 23,159

WHDH, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
BOSTON BROADCASTERS INC., *Intervenor*

No. 23,172

GREATER BOSTON TV CO., INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
WHDH, INC., *Intervenor*,
BOSTON BROADCASTERS INC., *Intervenor*

ORDER DENYING MOTION OF WHDH TO REMAND, DENYING MOTION OF CHARLES RIVER CIVIC TELEVISION, INC. FOR INTERIM RELIEF, DENYING MOTION OF BOSTON BROADCASTERS INC. FOR CLARIFICATION OF ORDER OF FEBRUARY 16, 1971, AND GRANTING IN PART THE MOTION OF WHDH, INC. FOR CONDITIONAL ENLARGEMENT OF TIME OF STAY

Before: TAMM, LEVENTHAL and MACKINNON,
Circuit Judges

ORDER

On consideration of the motion: 1. of WHDH to remand; 2. of Charles River Civic Television, Inc. for interim relief; 3. of Boston Broadcasters Inc. for clarification of this Court's order of February 16, 1971, and; 4. of WHDH

for conditional enlargement of time of stay, and of the responsive pleadings filed with respect to the foregoing, it is

ORDERED by the Court that the motion of WHDH to remand is denied for the reasons set forth in the attached opinion filed herein this date, and it is

FURTHER ORDERED by the Court that the motion of Charles River Civic Television Inc. for interim relief is denied, and it is

FURTHER ORDERED by the Court that the motion of Boston Broadcasters Inc. for clarification of this Court's order of February 16, 1971, is denied, and it is

FURTHER ORDERED by the Court that the motion of WHDH for conditional enlargement of time of stay is granted in part, to provide that the stay will stand revoked unless WHDH files a petition for certiorari on or before April 23, 1971. The court is of the view that appellant has had sufficient time to prepare its petition for certiorari, and this April 23 date is the latest date which this court can be confident will permit Supreme Court disposition this term.

Per Curiam

No.
17,785—Greater Boston Television Corporation v.
17,788 FCC
23,154
23,159
23,172

Before TAMM, LEVENTHAL and MACKINNON,
Circuit Judges.

Opinion on Motion To Remand

Per Curiam:

WHDH, Inc. disclaims any intention to ask this Court to review the FCC Memorandum Opinion and Order, adopted March 3, 1971, which denied its Petition to Request Remand, that the Commission apply to this Court for an order remanding the case to the Commission. Technically that is correct, since the application to the Commission was only that it take such action in its capacity as a litigant before this court. In any substantial aspect of the matter, however, this court is being asked to remand the case although the Commission opposes a remand. That is within our power, and perhaps even duty, if we determine that the state of the record is such as may preclude a just result.[1]

The elements of a just result embrace consideration of both the correct disposition of an individual case and sound rules of administration broadly applicable to both agencies and courts to provide dispositions that are in the interest of justice. Essentially WHDH is asking this court to direct the agency to reopen its record. The provision of 28 U.S.C. § 2347(c) not only confirms the authority to take such action, previously voiced by this court (see note 1) but also precludes reopening action

[1] Fleming v. FCC, 96 U.S.App.D.C. 223, 225 F2d 523 (1955).

by the Commission in the absence of this Court's order.[2] But in exercising its authority this court properly takes into account the views of the agency, especially where, as here, those views are contained in a formal order, accompanied by reasons, declining to request this court to order a remand.

A party seeking remand from a court of appeals in the face of an agency order declining to seek remand has at least as much burden as a party seeking reversal of a decision to deny reopening made by the agency prior to the institution of court action. It is a rule of administration tantamount almost to a rule of necessity that rehearings before an agency require exercise of discretion. A litigant's claim that "some new circumstance has arisen, some new trend has been observed, or some new fact discovered," must overcome the necessity for a rule of finality, and the need to avoid reopenings that "stall the enforcement of the administrative order."[3]

Courts have been liberal to provide remands on a substantial claim of action taken by an agency when one of its members was disqualified or under the impetus of an approach to the agency tainted by fraud, undue influence, ex parte representations and the like.[4] Such remand is responsive to the basic integrity of the administrative and judicial process.

---

[2] American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 543 (1970).

[3] I.C.C. v. Jersey City, 322 U.S. 503, 514-515 (1944).

[4] WORZ, Inc. v. FCC, 358 U.S. 55 (1958), and on remand see WORZ, Inc. v. FCC, 106 U.S.App.D.C. 14, 268 F.2d 889 (1959); WKAT v. FCC, 103 U.S.App.D.C. 324, 258 F.2d 418 (1958); Massachusetts Bay Telecasters v. FCC, 104 U.S.App.D.C. 226, 237-38, 261 F.2d 55, 66-67 (1958) (interested attempts "to influence any member of the Commission . . . except by the recognized and public processes [go] to the very core of the Commission's quasi-judicial powers"); Sangamon Valley TV Corp. v. United States & FCC, 106 U.S.App.D.C. 30, 269 F.2d 221 (1959).

For that reason we have examined the material cited in the motion to remand filed by WHDH to consider the possibility that there should have been disqualification—a possibility touched on in movant's papers. We find no substantial issue on this score. WHDH attaches an article from the December 28, 1970-January 4, 1971 issue of Broadcasting purporting to quote statements from former Commissioner James Wadsworth concerning his vote against WHDH. This quotes Mr. Wadsworth as saying he had been subjected to an ex parte approach in a telephone call a few days before the Commission was to meet to instruct the staff in the case, and this left him warm on the subject. But the ex parte approach did not relate to the Boston TV case, and certainly could not reasonably be asserted to disqualify him or taint his vote.

WHDH raises another issue—that according to what Mr. Wadsworth now related to Broadcasting, if correctly reported, it may be that he did not join in the majority's findings on the *WHDH* case. WHDH says this possibility raises the question whether an agency's action can be supported by findings or a rationale not concurred in by a majority of the commissioners. That question was raised in a footnote in *ICC* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, 751, fn. 8 (1963). In *Chicago, B. & Q. R. Co.* v. *United States*, 60 F. Supp. 580, 583 (3-judge court) (E.D. Ky. 1945) the court issued a ruling upholding the validity of an ICC decision signed by 4 out of 9 commissioners, the fifth stating he "concurred in the result".[5]

There would also arise the separate question whether a commissioner who purported to join in the majority

[5] The court interpreted that statement to mean that while this commissioner did not assent to all the comments or observations of the majority "he is, nevertheless, sufficiently in accord with the rationale of them to enable him to agree that Western Kentucky's rate to Chicago . . . is unreasonable to the extent stated and that an order for the future should be entered accordingly."

opinion and findings could impeach his action after his official standing came to an end.

This case has gone to a ruling. Rehearing has been denied. We could have terminated our stay forthwith, since it was granted to a party we ruled against on the merits. We continued the stay on condition a petition for certiorari was filed within 60 days from the denial of rehearing. Our assumption was that this would permit Supreme Court disposition this Term.

Some time litigation must come to an end. We are not to be taken as faulting counsel for WHDH for raising the question late. The failure of a litigant to raise a matter prior to the filing of an appeal in court cannot rightly be taken to foreclose him when the matter only arose after the filing of the appeal.[6] We do not even fault counsel for having applied in the first instance to the FCC to request a remand, instead of coming directly to this court which has the only jurisdiction to order the remand. This may well have represented a reasonable tactical decision. But when the motion comes to us at this late hour, and its granting would endanger vindication of the public interest as declared by the Commission in the decision affirmed by this court we would not feel justified in further delay unless we concluded that WHDH had a strong likelihood of prevailing on the merits. The consideration of the motion papers leaves us with the contrary conclusion, that the FCC's order denying the request that it seek remand is a sound exercise of discretion, and that the motion to remand should be denied.

In the article in Broadcasting Mr. Wadsworth is reported primarily as denying the imputation of Mr. Harold E. Clancy, president of Herald-Traveler Corp., based on the fact that Mr. Wadsworth's legal assistant, the late

[6] NLRB v. Jones & Laughlin Co., 331 U.S. 416, 427-28 (1947).

Joseph Kesler, before joining the FCC in 1966, had been employed by the firm that represented Boston Broadcasters, Inc. Mr. Wadsworth stated that Mr. Kesler had revealed his prior association to the Commissioner and had accordingly disqualified himself from giving any advice on the case. Mr. Clancy had raised a question whether Mr. Wadsworth had counseled with anyone else and Mr. Wadsworth said he had not before he voted.

The article then goes on to quote Mr. Wadsworth that his reason for voting against WHDH was the firm's attempt to exercise undue influence, and he said: "I don't care about the concentration-of-control question." But he did not add a separate statement as to his views for voting against WHDH, because this "didn't occur" to him, as no one had leveled an attack on him personally.

The Commission order said that it found the material presented by WHDH represented allegations based on double hearsay which are "procedurally defective, factually unpersuasive and legally an impermissible inquisition into the mental processes and motives of a decision maker." The Commission pointed out that Commissioner Wadsworth's joining the others was permissible for the same reason given by this court in sustaining the action of Commissioner Johnson in joining the decision of his fellow commissioners to avoid an impasse, that being accepted practice "at least assuming no violation of conscience is involved." While distinctions may be drawn between the two positions, we think this application of our decision is a tenable one, for we see no indication in the article that Mr. Wadsworth disavowed his official action in joining in the opinion prepared in accordance with the direction of the other commissioners, or that he considered it to violate his conscience, or that he did other than join in an opinion which was not his preference but which he was willing to accept for purpose of decision.

We turn to the question whether WHDH could seek to upset the award by hoping for testimony from Mr. Wadsworth that the reasons assigned by the Commission were not only different from the reasons he thought should govern but were reasons to which he was actually opposed. On this aspect of the case the FCC's order refusing to seek a remand, was predicated on the rule that in the absence of significant indication of misconduct or bias, courts will not permit the probing of the mental processes of a judge[7] of an administrative decision maker acting after a quasi-judicial proceeding.[8]

We are sufficiently satisfied with the FCC's disposition of this matter to say that we see no abuse of discretion or error that warrants the remand opposed by the FCC. We have already noted our readiness to undertake a remand in the interest of justice and to protect the integrity of the administrative and judicial process. But the remand sought here is for the purpose of probing the mental processes of a former commissioner. If such a probe is conducted in a case where it is not fully warranted,—by a categorical proffer of reliable evidence rooted in a sound legal principal—then the very conduct of the inquiry is one which compromises "the integrity of the administrative process."[9]

Motion to remand denied.

---

[7] Fayweather v. Ritch, 195 U.S. 276, 306-07 (1904).

[8] United States v. Morgan, 313 U.S. 409, 422 (1941); Norris & Hirshberg v. SEC, 82 U.S.App.D.C. 32, 163 F.2d 689 (1947).

[9] United States v. Morgan, *supra*, 313 U.S. at 422.